A

SRI ALAM SDN BHD

v.

WAN KHAIRANI WAN MAHMOOD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24 NCvC-2382-09-2012]
31 JANUARY 2013

C ***ISLAMIC LAW:*** *Syariah Court - Jurisdiction - Divorce proceeding - Husband a shareholder in plaintiff company - Wife's claim for "harta sepencarian" allowed - Issues on company law and trust law - Whether Syariah Court of Appeal encroached into jurisdiction of civil court - Whether civil court has jurisdiction to declare decision of Syariah Court*
D *of Appeal null and void - Whether parties to Syariah Court bound by decision - Federal Constitution, art. 121(1A) - Administration of Islamic Law (Federal Territories) Act 1993, s. 46(2)(b)(iv)*

JURISDICTION: *Syariah Court - Divorce proceeding - Husband a*
E *shareholder in plaintiff company - Wife's claim for "harta sepencarian" allowed - Issues on company law and trust law - Whether Syariah Court of Appeal encroached into jurisdiction of civil court - Whether civil court has jurisdiction to declare decision of Syariah Court of Appeal null and void - Whether parties to Syariah Court bound by decision - Federal*
F *Constitution, art. 121(1A) - Administration of Islamic Law (Federal Territories) Act 1993, s. 46(2)(b)(iv)*

WORDS & PHRASES: *"harta sepencarian" - Definition of - Whether refers to property jointly acquired by a husband and wife during subsistence of marriage - Islamic Family Law (Federal Territories) Act*
G *1984, s. 2*

The second and first defendants, who were husband and wife respectively, were divorced on 2 May 1990 and on the said date, the second defendant and one Marina Yusoff were the registered
H shareholders of the plaintiff. Back in 1975, the plaintiff had purchased two parcels of land ('the lands'). In relation to the divorce proceeding, the first defendant had filed a summons in the Syariah High Court claiming for "harta sepencarian" rights against the second defendant in respect of, *inter alia*, the lands which
I were eventually compulsorily acquired by the relevant authority. However, it was decided that the lands were not "harta

sepencarian" as between the first and second defendants but were the properties of the plaintiff. Dissatisfied, the first defendant appealed to the Syariah Court of Appeal whereby the court decided in favour of the first defendant. The plaintiff then filed an originating summons against the defendants to, *inter alia*, (i) challenge the decision of the Syariah Court of Appeal where it declared the lands as "harta sepencarian"; and (ii) seek an order for the compensation monies which were received for the acquisition of the lands and held by the third and fourth defendants as joint stakeholders to be paid to the plaintiff. The pertinent issue that arose for consideration was whether the Syariah Court of Appeal had acted within its jurisdiction or whether it had encroached upon the jurisdiction of the civil court in the adjudication of matters under company law and trust law.

Held (dismissing plaintiff's application):

(1) "Harta sepencarian" has been defined in s. 2 of the Islamic Family Law (Federal Territories) Act 1984 ('Act 303') to mean property which are jointly acquired by a husband and wife during the subsistence of marriage in accordance with the conditions stipulated by "Hukum Syara". By virtue of s. 58 of Act 303, the Syariah High Court, when making an order of divorce, is empowered to order the division between the parties of "harta sepencarian", subject to the considerations stipulated therein. (paras 18 & 20)

(1a) Article 121(1) of the Federal Constitution provides for the establishment of the civil courts and art. 121(1A) expressly provides that the civil courts shall have no jurisdiction over the Syariah courts. Section 46(2)(b)(iv) of the Administration of Islamic Law (Federal Territories) Act 1993 provides that a Syariah High Court of the Federal Territories shall, in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to the division of, or claims to "harta sepencarian". (paras 15 & 17)

(2) The Syariah Court of Appeal was acting within its own jurisdiction in determining what properties belonged to the second defendant, which were "harta sepencarian", and which ought to be divided between the first and second defendants. Thus, the said court did not encroach on the jurisdiction of the civil court in relation to company law and trust law matters. (para 35)

(3) The civil court had no jurisdiction to adjudicate on the first defendant's claim for "harta sepencarian" or to declare the decision of the Syariah Court of Appeal as null and void even if the properties involved were in the form of the second defendant's shares in the plaintiff or were in the form of shares owned by the second defendant but held under a trust deed in the plaintiff. (para 36)

(4) The Syariah Court of Appeal had already decided on the matter and a final judgment had been given. There was no possibility that the said court should make an order to stay its proceedings and then refer the company law and trust law matters to the civil court. Further, it was not within the jurisdiction of this civil court to review the decision of the Syariah Court of Appeal. Hence, the parties to the Syariah Court matter were bound by the decision of the Syariah Court of Appeal. (*Latifah Mat Zin v. Rosmawati Sharibun & Anor*; dist) (paras 38 & 39)

(5) The filing of this action could not, *per se,* tantamount to an abuse of process of the court. However, if it was proved that the second defendant was using the plaintiff company to file this action in order to have a second bite of the cherry on the issue of "harta sepencarian", then that could amount to an abuse of process. (para 43)

Case(s) referred to:

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(dist)***

Salomon v. Salomon & Co Ltd [1897] AC 22 ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, s. 46(2)(b)(iv)

Courts of Judicature Act 1964, ss. 23(2), 24(c)

Federal Constitution, art. 121(1), (1A)

Islamic Family Law (Federal Territories) Act 1984, ss. 2, 58

Syariah Court Civil Procedure (Federal Territories) Act 1998, ss. 199, 200

For the plaintiff - Pawanchek Marican (Suzilawati Ismail with him); M/s Wan Marican & Shaik

For the 1st & 4th defendants - Sulaiman Abdullah (PY Chong with him); M/s Kamaruzaman Arif, Amran & Chong

For the 2nd defendant - Absent

For the 3rd defendant - Mustaqim; M/s Khalek Awang & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Yeoh Wee Siam J:

Background Facts

[1] The plaintiff is a private limited company incorporated under the Companies Act 1965 on 21 January 1975 with the principal objectives of carrying out the business of land development, building construction and investment.

[2] The second and first defendants were husband and wife but they were divorced on 2 May 1990.

[3] The third and fourth defendants are firms of solicitors.

[4] On the date of the divorce, ie, on 2 May 1990, the second defendant and one Marina Yusoff were the registered shareholders of the plaintiff.

[5] The plaintiff had on 14 September 1975 purchased two parcels of land under Grant No. 8202, Lot 3777 in the Mukim of Kajang, District of Ulu Langat, Selangor and Grant No. 9508, Lot 5539, in the Mukim of Kajang, District of Ulu Langat which were later changed to the Mukim of Dengkil, in the District of Sepang ("the lands") from one Low Gan Hui @ Low Nan Pui (see affidavit in support of Mohamed, para. 9, exh. MM.3 pp. 76-81).

[6] The first defendant had filed a summons in the Syariah High Court, Wilayah Persekutuan, Kuala Lumpur, under Saman No. 0063/91T, claiming harta sepencarian rights against the second defendant in respect of, among other things, the lands which were eventually compulsorily acquired by the relevant authority for RM281,528,178.

[7] The Syariah High Court in its judgment on 14 September 2009 held, *inter alia*, as follows:

(a) That the second defendant and the companies that had been incorporated by the second defendant were different entities.

(b) That the lands were declared to be not harta sepencarian as between the first and second defendants but were the properties of the plaintiff (see affidavit in support of Mohamed, para. 11, exh. MM.4 pp. 83 and 84 (items 2 (ii), (iii)).

[8] The first defendant appealed to the Syariah Court of Appeal, Federal Territories, Kuala Lumpur under Kes Mal No: 14000-017-0027-2009 against the decision of the Syariah High Court.

[9] On 15 September 2011 the Syariah Court of Appeal allowed the appeal and held as follows:

(a) The appeal of the first defendant that the lands be declared as harta sepencarian, was allowed.

(b) The division of the compensation monies for the lands totaling RM281,528,178 had to be apportioned between the second defendant and the first defendant as harta sepencarian based on the ratio of 1/3 for the first defendant and 2/3 for the second defendant after deducting the debts incurred by the second defendant for the repayment of the purchase price of the lands and after deducting the liabilities of "Syarikat Sri Alam Sdn Bhd" ie, the plaintiff.

Enclosure 1

[10] This is an originating summons filed by the plaintiff against the defendants for, *inter alia*, the following orders:

(a) A declaration that the judgment and/or order of the Syariah Court of Appeal, Federal Territories, Kuala Lumpur in Kes Mal (Rayuan) No: 14000-017-0027-2009 dated 15 September 2011, in so far as the court had adjudicated upon company law matters, was null and void for contravening art. 121(1A) of the Federal Constitution.

(b) A declaration that the Syariah Appeal Court judgment and/or order, in so far as the court had adjudicated upon trust law matters, was null and void for contravening art. 121(1A) of the Federal Constitution.

(c) A declaration that the first limb of the order of the Syariah Appeal Court dated 15 September 2011, that is:

> The Appeal by the Appellant that the two parcels of land under Lot 3777 and Lot 5539, Mukim Dengkil, District of Sepang, Selangor be declared as harta sepencarian was allowed.

is null and void as the Syariah Appeal Court had encroached upon company law matters which fall outside the jurisdiction of the Syariah Courts under art. 121(1A) of the Federal Constitution.

(d) A declaration that the second limb of the Syariah Appeal Court Order dated 15 September 2011, that is:

> The Division of the Compensation Monies for the lands under Lot 3777 AND Lot 5539, Mukim Dengkil, District of Sepang, Selangor totaling RM281,528,178 was to be apportioned between the Appellant and the Respondent as harta sepencarian based on the ratio of 1/3 for the Appellant and 2/3 for the Respondent after deducting the debts incurred by the Respondent for the repayment of the purchase price of the Two Parcels of the said Land and after deducting the liabilities of Syarikat Sri Alam Sdn Bhd.

is null and void as the Syariah Appeal Court had encroached upon trust law and company law matters which fall outside the jurisdiction of the Syariah Courts under art. 121(1A) of the Federal Constitution.

(e) A declaration that the lands held under Lot Nos: Lot 3777 and Lot 5539, Mukim Dengkil, District of Sepang, Selangor or the compensation monies paid by the relevant authority for their acquisition ("the compensation monies") are the assets or properties of the plaintiff, a company incorporated under the Companies Act 1965.

(f) A declaration that the first and second limbs of the Syariah Appeal Court Order in Kes Mal (Rayuan) No: 14000-017-0027-2009 dated 15 September 2011 cannot be enforced against the plaintiff, its servants and/or agents as the plaintiff is a company incorporated under the Companies Act 1965.

(g) A declaration that the compensation monies or any part thereof held by a firm of solicitors Khalek Awang & Associate, (the third defendant), and another firm of solicitors, Kamaruzaman Arifin, Amran & Chong (formerly known as Nordin Torji & Partners), (the fourth defendant), as joint stakeholders at Am Islamic Bank at its Jalan Yap Kwan Seng Branch, Kuala Lumpur under Account Nos: ST.01066-000-004-00074-4-401, ST.01066-666-664-009190-5-401 and

ST.01211-003-008044-0-301 ("the joint account") together with all interest accruing thereon, are the assets and or properties of the plaintiff.

(h) A declaration that any order of a Syariah Court jeopardising and/or affecting the compensation monies belonging to the plaintiff is not enforceable in law as the plaintiff is a corporate body.

(i) An order that the compensation monies or any part thereof in the joint account and all interest accruing thereon be paid by the third and fourth defendants to the plaintiff within 14 days from the date hereof.

(j) Costs.

(k) Any other relief as deemed appropriate and just by this Honourable Court.

[11] The plaintiff's application can be summed up as follows:

(a) to challenge the decision of the Syariah Court of Appeal in Kes Mal (Appeal) No: 14000-017-0027-2009 dated 15 September 2011 allowing the first defendant's appeal to declare the two parcels of land under Lot 3777 and Lot 5539, Mukim Dengkil, District of Sepang, Selangor ("the lands") as harta sepencarian; and

(b) to seek an order for the compensation monies which were received for the acquisition of the lands and held by the third and fourth defendants as joint-stakeholders to be paid to the plaintiff within 14 days from the date of the order.

Court's Decision Given On 31 January 2013 Regarding Encl. 1

[12] The plaintiff's application is dismissed. Costs of RM6,000 are to be paid by the plaintiff forthwith to the first and fourth defendants jointly.

Grounds For The Court's Decision

Preliminary Objection Of The First Defendant

[13] The preliminary objection of the first defendant is dismissed.

[14] The court rules that for as long as the plaintiff is filing this action based on company law and trust law matters which are within the jurisdiction of the civil court, the plaintiff has *locus standi* to maintain the action. Notwithstanding this, the plaintiff's claim has to be decided on its merits according to the appropriate governing law.

Whether The Syariah Court Of Appeal Had Acted Within Its Jurisdiction Or Had Encroached Upon The Jurisdiction Of The Civil Court

[15] Article 121(1) of the Federal Constitution provides for the establishment of the civil courts and art. 121(1A) expressly provides that the civil courts shall have no jurisdiction over Syariah Court matters:

Judicial power of the Federation

121.(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

[16] Article 121(1A) therefore declares that the civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[17] Section 46(2)(b)(iv) of the Administration of Islamic Law (Federal Territories) Act 1993 provides that a Syariah High Court of the Federal Territories shall in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to "the division of, or claims to, harta sepencarian".

[18] "Harta sepencarian" has been defined in s. 2 of the Islamic Family Law (Federal Territories) Act 1984 ("Act 303") to mean property jointly acquired by a husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara.

[19] "Hukum Syara" in s. 2 of the same Act 303 has been defined to mean "Islamic Law according to any recognised Mazhab".

[20] By virtue of s. 58 of Act 303 the Syariah High Court, when making an order of divorce, is empowered to order the division between the parties of harta sepencarian, subject to the considerations stipulated therein.

[21] Under ss. 199 and 200 of the Syariah Court Civil Procedure (Federal Territories) Act 1998, the Syariah High Court is empowered to make orders for the preservation of any property or to grant an injunction over the subject matter of any of its proceedings which by necessary implication would include a claim for harta sepencarian.

[22] From the above statutory provisions, it is clear that the claim by the first defendant for harta sepencarian in the compensation monies is within the original jurisdiction of the Syariah High Court. It follows that the Syariah Court of Appeal has appellate jurisdiction over any appeal from the decision of the Syariah High Court.

[23] The civil court has jurisdiction over matters on company law and trust law.

[24] Section 24(c) of the Courts of Judicature Act 1964 provides:

> Without prejudice to the generality of s. 23, the civil jurisdiction of the High Court shall include:
>
> (c) jurisdiction under any written law relating to … companies.

[25] Section 23(2) of the Courts of Judicature Act 1964 provides: A

> Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its jurisdiction. B

[26] As submitted by learned counsel for the plaintiff, before Malaysia Day, ie, 31 August 1957, the civil court had jurisdiction over trust matters as provided in the Trustee Ordinance 1949 (now known as the Trustee Act 1949). The Trustee Act 1949 is a law of general application for Muslims and non-Muslims. C

[27] The question now is whether the Syariah Court of Appeal, in arriving at its decision on the division of harta sepencarian had acted within its jurisdiction or had it encroached on the jurisdiction of the civil court in the adjudication of matters under company law and trust law. D

The First Limb Of The Syariah Court Of Appeal Order

[28] The first limb of the Syariah Court of Appeal Order states: E

> The Appeal by the Appellant that the two parcels of land under Lot 3777 and Lot 5539, Mukim Dengkil, District of Sepang, Selangor be declared as harta sepencarian is allowed.

[29] The first limb of the Syariah Court of Appeal Order was based on the following grounds of judgment dated 15 September 2011: F

> [23] ...thus the decision of the Syariah High Court in paragraph (r)(l) that the Respondent is the holder of 100% share in Syarikat Sri Alam most certainly all the assets obtained by the company are owned by the Respondent including the said Compensation Monies. This is different from a company that is listed in the Stock Exchange whereby these are owned by the shareholders and each share held has a current value. G
>
> [25] Notwithstanding (the above), the learned Trial Judge did not examine further, when ruling that the shares of the Respondent in Syarikat Sri Alam, whether this (ruling) involved the two parcels of land. The failure to make a deeper analysis to that question has resulted in the decision of the learned Trial Judge being viewed as inconsistent with one another. The learned Trial Judge had ruled that the property of a company cannot be claimed as harta sepencarian on the ground that the company and the H I

A Respondent as a shareholder are different entities, based on the reference made to the case of *Solomon v. Solomon* that was decided by the Civil Court. Thus the learned Trial Judge had ruled that the two (parcels of) Land were not harta sepencarian. I do not wish to give an explanation
B regarding the principles of company law and the interpretation in the Civil Court as I believe that my principal duty is to give a commentary based on section 58 of the Islamic Family Law (Federal Territories) Act 1984 and what principles of Syariah Law will act as guidelines thereto.

C [31] With this I am satisfied that Syarikat Sri Alam is fully owned by the Respondent. Therefore Syarikat Sri Alam and the Respondent are the same entity although based on the Companies Act the Respondent and Syarikat Sri Alam are different entities. According to Syariah Law the important fact is: who is the real owner of the property. It is clear that
D Syarikat Sri Alam is fully owned by the Respondent.

[30] Learned counsel for the plaintiff submitted that the Syariah Court of Appeal had encroached upon company law matters by ruling in paras. 23, 25 and 31 of its judgment as follows:

E (a) that it was satisfied that the plaintiff "is fully owned" by the second defendant (para. 23 of the judgment);

(b) that the plaintiff and the second defendant "are the same entity" (para. 31 of the judgment);

F (c) that "it is clear" that the plaintiff "is fully owned" by the second defendant (para. 31 of the judgment).

The Second Limb Of The Syariah Court Of Appeal Order

G **[31]** The second limb of the Syariah Court of Appeal Order states:

The Division of the Compensation Monies for the lands in Lot 3777 AND Lot 5539, Mukim Dengkil, District of Sepang,
H Selangor totaling RM281,528,178 had to be apportioned between the Appellant and the Respondent as harta sepencarian based on the ratio of 1/3 for the Appellant and 2/3 for the Respondent after deducting the debts incurred by the Respondent for the repayment of the purchase price of the Two Parcels of the said Land and after deducting the liabilities of Syarikat Sri Alam Sdn Bhd.

I

[32] The second limb was based on the following grounds of judgment: A

[26] Furthermore I refer to the Deed of Trust dated 25/05/1993 that was entered into between the Respondent and Mohamed Mustapha which is found in the Appeal Record Volume 6, pages 247-251. In one of the parts of the Deed of Trust it is stated that: B

> WHEREAS ISMAIL B. MOHAMAD hereby bequest that the 467,600 said shares unto his children herein below named as gift for love and affection. The number of shares for each of his children is to be determined by Ismail b. Mohamed at a later date. C

[27] I am of view that the said phrase merely shows the proposal by the Respondent to surrender the said shares to the 8 children mentioned in the said Deed of Trust based on (the fact that) the share of each child has not been determined by the Respondent (yet). Therefore I am of the view that the said gift has not occurred. This fortifies the following phrase that is mentioned in the Trust Deed, that is: D

> WHEREAS MOHAMED B. MUSTAPHA agrees and covenants to transfer the legal ownership of the said shares to ISMAIL B. MOHAMED or to any of ISMAIL B MOHAMAD'S nominees at the request of ISMAIL B. MOHAMAD. E

[28] With respect I refer to an earlier Trust Deed that was entered into between Mohamed Mustapha and the Respondent dated 08.08.1991 as found in the Appeal Record Vol 5, pages 149-150 that states: F

> WHEREAS: G
>
> (a) This declaration is supplemental to the transfer of Shares Certificate held under Certificate No. 022 and 023 of the company known as Sri Alam Sdn Bhd (herein after referred to as the "Said Shares") registered on 09/07/1975 and 02/09/1977 whereby the said shares were transferred by ISMAIL B. MOHAMAD to Trustee at the purchase price consideration specified therein. H
>
> (b) All sums so far paid towards the said purchase to the said transfers were provided by the Beneficiary as the Trustee hereby acknowledges. I

NOW THIS DEED WITNESSETH as follows:

1. In consideration of the above premises, the Trustee hereby declares that he holds the said shares in trust for the beneficiary and will at the request and cost of the beneficiary transfer the said shares to such person or persons at such times as the Beneficiary shall direct or appoint and will at all times execute and do all such documents act and things as may be necessary to procure the appropriate registration or entry in the Company Registry to give effect to any such dealing.

[29] The Trustee that is mentioned in the said phrase refers to Mohamed Mustapha and the Beneficiary refers to the Respondent as stated at the beginning of the Trust. Thus, based on the Trust Deed of 1991 it is evident that this proves that Mohamed Mustapha held the shares in Sri Alam not for himself but as trustee for the Respondent. In simple language the shares in reality belong to the Respondent.

[33] After perusing the grounds of judgment of the Syariah Court of Appeal, I find that the Syariah Court of Appeal was not deciding substantively on company law and trust law matters which are within the jurisdiction of the civil court. The Syariah Court of Appeal was focused mainly on deciding the issue of what are the properties that are owned by the second defendant (ie, the respondent in the Syariah Court case), be they compensation monies or shares in a company, which are considered to be harta sepencarian and, if so, how should such properties be divided. In coming to its decision, the Syariah Court of Appeal made a finding that while it is true that under company law, the second defendant and the plaintiff company are separate entities, as far as he is concerned, the fact that the second defendant owns 100% of the shares of the plaintiff company means that he owns all the shares in the company and as such the shares should be divided as harta sepencarian. Similarly, when the Syariah Court of Appeal considered the two trust deeds of 1991 and 1993, it found that the shares belong to the second defendant.

[34] Learned counsel for the plaintiff cited *Salomon v. Salomon & Co Ltd* [1897] AC 22 and submitted that the corporation is a legal entity distinct from its members, be they individuals or corporate

bodies. The Syariah Court of Appeal is fully aware of such principle but decided not to deal with company law matters. This can be seen in the Syariah Court of Appeal judgment at p. 31:

> Saya tidak berhasrat untuk memberikan ulasan terhadap prinsip syarikat mengikut Akta Syarikat dan tafsiran di Mahkamah Sivil kerana saya percaya tugas utama saya adalah untuk membuat ulasan berdasarkan peruntukan seksyen 58 Undang-undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 dan apakah prinsip hukum syarak yang memberi panduan berkenaan dengannya;

and at p. 34:

> Mengikut hukum syarak fakta yang penting ialah siapa pemilik sebenar harta itu. Telah jelas bahawa syarikat Sri Alam dimiliki sepenuhnya oleh Responden. Maka apabila Responden telah memperolehi harta dalam tempoh perkahwinan yang masih berkuatkuasa berupa tanah Sepang yang bertukar menjadi wang pampasan, harta tersebut merupakan harta sepencarian sepertimana yang dimaksudkan di bawah seksyen 2 Akta Keluarga Islam (Wilayah-wilayah persekutuan) 1984 sebagaimana berikut:
>
> > Harta yang diperolehi bersama oleh suami isteri semasa perkahwinan berkuatkuasa mengikut syarat-syarat yang ditentukan oleh hukum syarak.

[35] From the above, it is clear that the Syariah Court of Appeal was acting within its own jurisdiction in determining what properties belong to the second defendant which are harta sepencarian and which ought to be divided between the first and second defendants. I therefore hold that the Syariah Court of Appeal did not encroach on the jurisdiction of the civil court on company law and trust law matters.

[36] The civil court has no jurisdiction to adjudicate on the first defendant's claim for harta sepencarian or to declare the decision of the Syariah Court of Appeal null and void even if the properties involved are in the form of the second defendant's shares in the plaintiff company or are in the form of shares owned by the second defendant but held under a trust deed by Mohamad Mustapha in the plaintiff company. This is consistent with the rationale in the Federal Court decision, which was pointed out by learned counsel for the first defendant, in a derivative action commenced by the first defendant, where Zaki

Tun Azmi, Chief Justice (as he then was) stated at p. 22 of the grounds of judgment (exh. CPY1 in the fourth defendant's affidavit affirmed on 12 October 2012):

> Should she be successful at the Syariah Court to more than the value proportionate to her registered number of shares in the Company, then the monies now held by her Husband as trustee for the Company can be paid to her. In a divorced wife's claim for harta sepencarian, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if we are to limit the injunction to only 7.97% of the monies now held in the name of the Husband, in effect this court would already be deciding that the Wife is only entitled to that portion of the monies. This court has no jurisdiction. As to her rights in the Syariah court, I would not like to make any comments. It is left to the relevant forum to decide.

[37] Learned counsel for the plaintiff cited the Federal Court case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 4 AMR 621 where Abdul Hamid Mohamad FCJ (as he then was) at p. 285 (CLJ), p. 643 (AMR) laid down certain guidelines for the Civil Court and the Syariah Court where a conflict of jurisdiction arose:

> ...from the judgment, we do not know if the contradictory claims over the disputed shares concern the question of gift *inter vivos* or "hibah" or on some other non-Syariah legal ground e.g. under companies' law. If it was the former (ie, under Syariah law), then the Syariah Court should have decided whether there was a "hibah" in accordance with Islamic law of those disputed shares and then proceed to determine the shares of the beneficiaries, respectively, according to "faraid". If it was the latter, of course the Syariah Court should not embark on civil law to determine the question whether those disputed shares were part of the estate of the deceased or not. This is a matter for the civil court. If that was the case, **what the Syariah Court could do was to stay proceedings until that issue is determined by the civil court**. Once that is determined, and if it forms part of the estate of the deceased, then the Syariah Court should proceed to determine the portion to which each beneficiary is entitled to, according to "faraid", that order is then filed in the civil court, which will give effect to it. Of course that is very cumbersome. **But, that is the only way out under the current law**. (emphasis added).

[38] The above guideline laid down by the Federal Court can only apply in a situation where the proceedings are still ongoing and not completed. However, the present case has to be distinguished from *Latifah*'s case (*supra*) in view of the fact that the Syariah Court of Appeal has already decided on the matter and a final judgment had been given. There is no possibility of, or any question arising now that the Syariah Court of Appeal should make an order to stay its proceedings and then refer the company law and trust law matters to the civil court. In any case, at the material time, the Syariah Court of Appeal did not deem it fit to stay its proceedings in order to refer such matters to the civil court.

[39] It is not within the jurisdiction of this Civil Court to review the decision of the Syariah Appeal Court. That being the case, the parties to the Syariah Court matter are now bound by the Syariah Court of Appeal decision. The plaintiff contended that it is not a party to the Syariah Court proceedings between the first and second defendants. But that does not mean that the plaintiff can now institute an action in this court to declare the decision of the Syariah Court of Appeal null and void. There is no provision in our statutes which empower the civil court to grant the declaratory reliefs sought by the plaintiff in this case. As expressed by Abdul Hamid Mohamad FCJ (as he then was) at p. 644 of *Latifah*'s case (*supra*), the present case is yet another case where the Parliament is called upon to step in to remedy the situation.

Settlement Agreement (exh. MM-14 at pp. 186 and 187)

[40] After the Syariah Court of Appeal allowed the first defendant's appeal and held that the lands are harta sepencarian, both the first and second defendants entered into a settlement agreement with the following terms:

> "Ismail Bin Mohamed ("Ismail") and Wan Khairani Binti Wan Mahmood ("Wan Khairani") hereby agree to resolve all their disputes in the civil courts in the following manner:
>
> 1. Wan Khairani shall withdraw the derivative action in Civil Suit No. S-22-1143-2002 ("the Derivative Action"), as well as the allegations therein, against Ismail with no order as to costs. The injunction granted in the Derivative Action wherein monies are presently held in both parties' solicitors' joint account shall be forthwith set aside but the said monies and all accruing profits thereon shall continue to be subject

A to the injunction order granted by the Syariah Court and the monies and all accruing profits thereon will be dealt with in accordance with such order and/or directions given or to be given by the Syariah Court.

2. …

B

3. In consideration of Ismail procuring Sri Alam Sdn Bhd and Ladang Sri Alam Sdn Bhd to effect the relevant resolutions to discontinue any pending proceedings and to undertake not to file any further action against Wan Khairani, Wan Khairani undertakes:

C

(a) to discontinue any pending proceedings and undertake not to file any further action and/or legal proceedings against Ismail save for the purpose of enforcing any orders made by the Syariah Court;

D

(b) to discontinue any pending proceedings and undertake not to file any further action or legal proceedings against and/or in relation to Rasa Rata, Sri Alam Sdn Bhd and Ladang Sri Alam Sdn Bhd and/or other companies or persons associated with Ismail save for the purpose of

E enforcing any orders made by the Syariah Court;

(c) …

(d) …

F (e) …

4. The settlement between Ismail and Wan Khairani herein shall be full and final in relation to all past, present and future legal proceedings and/or actions in the civil courts but shall not affect the Syariah proceedings and/or action between

G them.

[41] From the express terms of the settlement agreement, in particular cls. 1 and 4 above, it is clear that both parties have agreed to abide by the decision of the Syariah Court.

H **[42]** The plaintiff contended that it is not party to the settlement agreement. That is true. However, there is no way now for the plaintiff to use these proceedings to overturn or nullify the decision of the Syariah Court of Appeal in so far as it has decided on the division of the harta sepencarian of the first and second

I defendants.

Abuse Of Process

[43] The court notes that the plaintiff was not a party to the proceedings between the first and second defendants in the Syariah Court. There is no statutory provision to allow the plaintiff to intervene in those proceedings. The plaintiff is therefore seeking relief in this court. The filing of this action by the plaintiff *per se* cannot tantamount to an abuse of process of the court. However, if it is proved that the second defendant is using the plaintiff company to file this action in order to have a second bite of the cherry on the issue of harta sepencarian which has already been adjudicated by the Syariah Court then that can amount to an abuse of process.

[44] The court further notes the submission of learned counsel for the first defendant that the Syariah Court of Appeal has recognised that the filing of this originating summons in the Civil Court is an abuse of process bordering on contempt and has given leave to proceed with committal proceedings against the second defendant, the plaintiff's directors and solicitors.

[45] Based on the above considerations, I therefore ordered accordingly.